Supreme Court, U. S.
FILED
DEC 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-957

BACHE HALSEY STUART INCORPORATED and
IRVING J. LOUIS, JR.,

Petitioners,

—against—

COMMERCIAL IRON & METAL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE
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No._____

BACHE HALSEY STUART INCORPORATED and IRVING J. LOUIS, JR.,

Petitioners,

- against -

COMMERCIAL IRON & METAL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the judgment entered in this case on August 7, 1978 in affirmance of a verdict after trial, and to review an order entered April 26, 1973 reversing an order

of summary judgment directing arbitration between the parties hereto.

OPINIONS BELOW

The aforementioned opinions are reported at 581 F.2d 246 and 478 F.2d 39 respectively. Copies of the opinions are included in the Appendix hereto at pages A18 and A1, respectively.*

JURISDICTION

The judgment of affirmance after trial was entered on August 7, 1978 and the order reversing the order of summary judgment was entered on April 26, 1973. The orders of the Court of Appeals denying rehearing and rehearing in banc in each of these appeals were entered on September 18, 1978 and May 22, 1973,

* References to the Appendix hereto are by the letter "A" followed by a page number. References to the Joint Appendix are by the letters "JA" followed by a page number.

respectively. The orders denying rehearing are included in the Appendix hereto at pages A31 and A16, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is Rule 56 of the Federal Rules of Civil Procedure to be applied in accordance with its terms and underlying policy to achieve early dispositions of cases, or may summary judgment be denied, notwithstanding failure to show an issue of fact, merely to give a party". . . an opportunity to present evidence backing up its assertions" as was ruled by the Court of Appeals herein?

2. May the Uniform Commercial Code and state decisional law, which preclude modification of signed written

agreements by proof of prior oral promises and representations contravening the terms of the written agreements, be circumvented by denominating claims for oral modification as claims of fraudulent misrepresentations?

3. Did the federal policy, as expressed in the United States Arbitration Act, require the trial court to direct arbitration, pursuant to the agreement of the parties, so soon as the mandate of the Court of Appeals -- that arbitration be granted if no securities act issues are involved -- was satisfied by the trial judge's ruling that the instant action involved no securities act issues?

4. Where a Court of Appeals, without citation of authority, affirms the correctness of jury instructions below by stating the instructions to be in accord-

ance with state law, should there be a re-reversal upon a showing that the Court of Appeals ruling does not conform to state law?

5. Does there come a point in a civil case where a fair trial is denied and the interests of justice disserved when, in a case between buyer and seller under fifteen signed contracts of sale which were anticipatorily repudiated by the buyer, the court admits proof and instructs the jury in such a way as to present a picture of the seller as an unfaithful broker, whereas there was no broker relationship whatsoever in the case?

STATUTES AND RULES INVOLVED

The statutes involved herein are sections of the United States Arbitration Act, 9 U.S.C §§ 2,3,4. and Rule 56, of the Federal Rules of Civil Procedure, and the

provisions of §§1-102, 2-104, 2-202 and 2-209(2) of the Uniform Commercial Code as enacted in New York and Colorado. Copies of the pertinent provisions are set forth in the Appendix annexed hereto at pages A33 through A51.

STATEMENT OF THE CASE

Bache Halsey Stuart Incorporated ("Bache") is a member of the principal securities and commodity exchanges and operates as a broker in transactions involving securities and commodity futures; it also is a dealer in metals which it purchases or sells as a principal. The instant case involves only Bache's latter role of principal as the seller of copper under fifteen (15) written and signed contracts that it made with Commercial Iron & Metal Co. ("Commercial"), as

purchaser-principal. Commercial is a dealer and speculator of long experience in scrap and refined metals. Bache's representative ("Louis") and Commercial's representative ("Duman") each had more than 30 years of experience in the metals business at the time they effected the transactions in suit.

The fifteen (15) written contracts between the parties were made on different dates between April 7, 1970 and August 7, 1970. Each contract provided for Commercial's purchase from Bache of from 100,000 to 600,000 pounds of copper (a total of 3 million pounds and more than $2,000,000 in price) to be delivered from five to seventeen months after purchase. Each contract contained a broad arbitration clause, a provision that the law of New York should govern and that

modification or amendment could be accomplished only by a writing signed by the parties. A specimen contract is included in the Appendix hereto at page A52.

Before the date for delivery and payment under the first of the fifteen contracts and after a great decline in the market price of copper, Commercial refused to perform any of the contracts and demanded rescission. Commercial started suit for rescission and damages in the District Court of the City and County of Colorado on the ground of alleged false representations by Bache to the effect that the price of copper was bound to rise and that Bache had special information which would insure a profit to Commercial and for breach of the securities laws of New York and Colorado. The case was removed to the United States District

Court for the District of Colorado on the ground of diversity of citizenship at the instance of Bache which pleaded an arbitration defense and counterclaim, and endeavored, in the federal courts of New York (Bache & Co., Inc. v. Commercial Iron & Metal Co., 71 Civ. 348 (S.D.N.Y. April 9, 1971); Bache & Co., Inc. v. Commercial Iron & Metal Co., 71 Civ. 2475 [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,114 (S.D.N.Y. July 7, 1971)) as well as Colorado, to obtain arbitration in respect of Bache's claim against Commercial for $537,175 for the difference between the unpaid contract price and the price at which Bache had resold the copper for the account of Commercial.

A motion for summary judgment by Bache on its demand for arbitration was granted on a finding by United States District Judge Fred Winner that written

agreements established that the relationship of the parties was solely that of seller and buyer and that there were no securities claims in the case which would preclude arbitration under the rule of Wilko v. Swan, 346 U.S. 427, (1953). The affidavit interposed in opposition to the motion for summary judgment presented nothing to show the existence of a securities or investment contract claim, or fraud in the inducement of the arbitration clause. The decision granting summary judgment was reversed by the Court of Appeals for the Tenth Circuit. Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39 (10th Cir. 1973). The Court of Appeals stated, inter alia:

> "Commercial's allegations cannot be proved unless it is given an opportunity to present evidence backing up its assertions. For the court to grant summary judgment at this stage of the

> proceeding effectively denies Commercial the opportunity to prove its charges of fraud." (478 F. 2d at 43)

The Court of Appeals also said, notwithstanding the the construction of the contracts was a matter of law:

> "If the contracts are no more than contracts to purchase copper at a future date, the arbitration clause found in each contract is binding on our court and precludes us from exercising jurisdiction." (478 F.2d at 41)

Bache consistently maintained that there were no securities questions in the case and that it was entitled to arbitration. Only as recently as four months before commencement of trial Bache again moved for arbitration and the United States District Court judge who later tried the case entered an order

> ". . . that the question of arbitration must await the taking of evidence on the issue of the existence of investment contracts . . .." (JA 80)

Although the trial court, during trial, dismissed the plaintiff's claims based on the federal and state securities laws, it did not order arbitration, notwithstanding that, upon dismissing plaintiff's securities claims, the trial judge stated, "I know what the Court of Appeals said." (JA 604/3)

During the trial, under the cover of its so-called securities law claims, the plaintiff introduced evidence relating to extensive dealings wherein Bache served as a broker for plaintiff and several affiliated companies in plaintiff's large-scale speculative dealings in commodities futures on commodity exchanges. The broker-customer dealings between the parties involving commodities futures had nothing to do with this case in which the parties had only principal-to-principal dealings

as seller and buyer under the fifteen (15) contracts of purchase that plaintiff repudiated. The evidence was thoroughly misleading to the jury in presenting Bache as a broker with the fiduciary responsibilities that attend on that status. Although the trial judge dismissed plaintiff's securities claims, it nevertheless let stand Commercial's aforementioned proof as to brokerage dealings and delivered extensive instructions to the jury which confirmed Bache in the role of a broker and spelled out its obligations as such, notwithstanding that in this case Bache and Commercial were merely copper merchants dealing as seller and buyer, respectively, with no broker-customer relationship whatsoever.

The unreal "broker" aspect of the trial was abetted by the trial judge's

recapitulation to the jury of the irrelevant fact that, years before, Bache had solicited Commercial to transfer its brokerage business from Merrill Lynch to Bache and promised to supervise Commercial's "account", and that a confidential relationship between the parties could be found upon a showing that Bache had acted as Commercial's agent and broker. None of these instructions was relevant to the fifteen purchase and sales contracts in suit. Moreover, in charging the law of fraud to the jury, the court enumerated Commercial's claims of fraud and misrepresentation - that Louis assured it that the price of copper was bound to rise, that Louis claimed access to special information which would assure Commercial a profit and that Bache failed to disclose to Commercial that it was a broker and a

principal. The latter instructions were given despite the fact that they contradicted the contracts which clearly defined each of the parties as a principal. The trial court also allowed proof that, months before the parties entered into the contracts later repudiated by Commercial, Louis stated to Duman, in a casual conversation at a metal trades convention, that, if the price of copper declined after the making of a purchase contract, a contract could be rolled forward to a later date of performance. The court charged the jury that such a casual statement (which Commercial did not attempt to incorporate into any of the fifteen agreements made from one to four months thereafter) would support a finding of fraud and misrepresentation. It will be later shown that none of the

so-called misrepresentations is actionable in law.

The proof was undisputed that Commercial, a metals merchant, was knowledgeable and sophisticated in both physical and "futures" metal dealings by reason of extensive and extended prior dealings with Bache and others in the purchase of physical metals under identical contracts, while at the same time conducting equally extensive speculative dealings in "futures" on exchanges.

The end result of the proceedings in the trial court was to deny Bache the arbitration right that was expressed in each of its contracts with Commercial, and to leave the jury with the impression that the case was one between an unfaithful broker and its customer rather than one between two merchants of equal skill

and experience under explicit written purchase and sales agreements. The trial court charged that the jury could find fraud and misrepresentation on the basis of the claims summarized above. The trial judge charged that the jury could find reliance by Commercial on the false representations (legally insufficient in the first instance), notwithstanding the fact that there was not an iota of proof of reliance in the trial record.

The trial proceedings and its errors, were approved by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS, IN ITS EARLIER REVERSAL OF THE DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT DIRECTING ARBITRATION, DECIDED THE APPEAL IN DISREGARD OF THE PROVISIONS OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

In 1972, Bache obtained a direction for arbitration and a stay of the district court action on a summary judgment finding of United States District Judge Winner that there were no securities questions in the case, but only contracts of purchase and sale, and no showing of any issue of fact with regard to the obligation to arbitrate. This judgment was reversed by the Court of Appeals, Commercial Iron & Metal Co., v. Bache & Co., Inc., 478 F. 2d 39 (10th Cir. 1973).

The Court of Appeals, in reversing the order of summary judgment directing arbitration, departed radically from the letter and purpose of Federal Rule of Civil Procedure 56. The Court of Appeals stated:

> "Commercial's allegations cannot be proved unless it is given an opportunity to present evidence backing up its assertions. For the Court to grant summary judgment at this stage of the proceeding effectively denies Commercial the opportunity to prove its charges of fraud". 478 F. 2d at 43.

This statement is erroneous. The Court of Appeals' statement ignores the mandate of Rule 56(e) which states in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine

> issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

It was not proper, under Rule 56, in the face of uncontroverted proof establishing Bache's right to a summary judgment directing arbitration, to reverse the summary judgment order in order to afford Commercial a later opportunity to adduce proof that it had failed to adduce in opposition to the motion. It is stated in the Notes of the Advisory Committee on the 1963 Amendment of the Rules that the party opposing summary judgment should present his proof on the motion and not at some later date as ruled by the Court of Appeals herein. Other Circuit Courts of Appeals do not agree with the Court of Appeals' denial of summary judgment in order to allow a later opportunity to

adduce proof of its claims. Soar v. National Football League Players Ass'n, 550 F. 2d 1287 (1st Cir. 1977); Chapman v. Rudd Paint & Varnish Company, 409 F. 2d 635 (9th Cir., 1969); Lundeen v. Cordner, 354 F. 2d 401 (8th Cir. 1966). Recent writings are illuminating on this point. In the case of Securities & Exchange Commission v. Research Automation Corp., No. 78-6006, Fed.Sec.L.Rep. (CCH) ¶ 96,577 (2d Cir. Oct. 16, 1978), in affirming an order of United States District Court Judge Sylvester J. Ryan granting summary judgment in one of the most delicate and subtle of litigations - a securities fraud case in which an injunction was sought, Chief Judge Kaufman stated:

> "In this era of mounting congestion at every level of the Federal courts, procedural devices capable of terminating litigation quickly, efficiently,

> and fairly acquire increased significance. One of the most important of these mechanisms is the motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedures."

In the December 4, 1978 issue of the National Law Journal, at page 28, Morris B. Abram deplores the judicial and professional waste involved in unwarranted denials of summary judgment at both the District Court and Court of Appeals levels.

Bache's motion for summary judgment established the right to arbitration as a matter of law. The fifteen agreements, each containing an arbitration clause, and each spelling out clearly the relationship of buyer and seller, on their face negated the existence of a "securities" or "investment" contract. Securities & Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946); Wilko v. Swan,

346 U.S. 427 (1953). The papers that were submitted in opposition to Bache's motion for summary judgment neither claimed nor showed fraud in the inducement of any of the executed arbitration agreements, which fraud, under Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) would be the only fraud claim that could preclude arbitration.

The unwarranted reversal of the summary judgment order by the Court of Appeals herein denied the parties the expeditious disposition which would have been attained by an arbitration proceeding and thereby imposed a five year delay and a tremendous burden of work and cost upon the parties and the judicial system that, as is shown elsewhere in this petition, resulted in a grave miscarriage of justice in a trial that never should have been held.

II

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH ESTABLISHED STATE LAW WHICH PROVIDES IN BOTH NEW YORK AND COLORADO THAT MISREPRESENTATION MAY BE CLAIMED ONLY AS TO A PAST OR PRESENT MATERIAL FACT AND MAY NOT BE PREDICATED UPON A REPRESENTATION AS TO A MATTER OF INTENTION OR UPON AN UNFULFILLED PROMISE TO PERFORM AN ACT

In response to Bache's argument that the trial judge erred in not applying New York law (declared by the contracts to be controlling) for the proposition that misrepresentations must relate to representations of past or present facts and may not be based on unfulfilled promises to perform a future act, the Court of Appeals stated (581 F.2d at 250), without citation of authority, that the trial judge "properly instructed in accordance with Colorado law on the issue of fraud

and misrepresentation". By this undocumented statement, which ignored the applicability of New York law, the Court of Appeals placed the mantle of legal correctness on the trial court's rulings and charges as to Commercial's claims, all of which related to the future and not to past or present facts - that contracts could be "rolled over" for later performance, that the price of gold would go up, that Bache's experience would assure Commercial of profits, and so forth.

Contrary to the undocumented statement of the Court of Appeals, the law of Colorado, as well as that of New York, does not hold promissory statements as to the future or statements as to matters other than present or past fact, to be sufficient to support claims for fraud and misrepresentation. It is the law in both

states that only representations as to past or present fact are actionable. United Fire & Casualty Co. v. Nissan Motor Corp., 164 Colo. 412; 433 P. 2d 769 (1967); Leece v. Griffin, 150 Colo. 132, 371 P. 2d 264 (1962); Bell Press, Inc. v. Phillips, 147 Colo. 461, 364 P. 2d 398 (1961); Adams v. Clark, 239 N.Y. 403, 146 N.E. 642 (1925); Farris v. Strong, 24 Colo. 107, 48 P. 963 (1897); First National Bank of Hamden v. Kaufman, 58 App. Div. 2d 668, 395 N.Y.S. 2d 713 (3d Dep't 1977); Lanzi v. Brooks, 54 App.Div. 2d 1057, 388 N.Y.S. 2d 946 (3d Dep't 1976), aff'd, 43 N.Y. 2d 778, 373 N.E. 2d 278 (1977); 24 N.Y. Jur. Fraud & Deceit §157 (1962).

The Court of Appeals' erroneous approval of the trial judge's rulings in respect of the foregoing matters is compounded by the fact that the record

below is utterly devoid of proof of reliance by Commercial - an indispensable requisite of liability under state law that was fully briefed by Bache to the Court of Appeals. Western Homes Inc. v. District Court, 133 Colo. 304, 296 P. 2d 460 (1956); Jessey v. Butterfield, 61 Colo. 256, 157 P. 1 (1916); Colorado Kenworth, Inc. v. Huntley, 537 P. 2d 1087 (Colo. Ct. App. 1975); Jones v. Title Guarantee & Trust Co., 277 N.Y. 415, 14 N. E. 2d 459 (1938); Brickner v. Linden City Realty Inc., 23 App.Div. 2d 560, 256 N.Y.S. 2d 533 (2d Dep't 1965); Irvlor Realty Corp. v. 62-114 Imlay Street Corp., 151 N.Y.S. 2d 191 (Sup. Ct. 1956), aff'd, 7 App.Div. 2d 645, 180 N.Y.S. 2d 202 (2d Dep't 1958).

The Court of Appeals was obliged to apply controlling state law. Byrd v.

Blue Ridge Rural Elect. Cooperative, 356 U.S. 525 (1958); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). It did not do this. Instead, the Court of Appeals affirmed the submission to the jury of alleged statements, made long before the contracts in suit, that could not, as a matter of law, constitute actionable misrepresentations. This was done by an undocumented misstatement of and departure from Colorado and New York law. The Court of Appeals' departure from controlling principles of state law should be corrected.

III

THE COURT OF APPEALS HAS FRUSTRATED THE INTENDED PURPOSE AND EFFECT OF THE UNIFORM COMMERCIAL CODE AND OF ESTABLISHED DECISIONAL STATE LAW IN RULING THAT THE PROVISIONS OF THE FIFTEEN SIGNED WRITTEN CONTRACTS MAY BE MODIFIED, AND EVEN NULLIFIED, BY PROOF OF ORAL PROMISES AND REPRESENTATIONS, MADE MONTHS BEFORE THE NEGOTIATION AND EXECUTION OF ANY OF THE CONTRACTS, WHICH CONTRADICT THE TERMS OF THE WRITTEN CONTRACTS

The Uniform Commercial Code was enacted to achieve fixity and uniformity in commercial relationships. N.Y.U.C.C. §1-102 (McKinney's 1964); Colo. Rev. Stat. §4-1-102 (1973) (The relevant provisions of the New York and Colorado Uniform Commercial Codes are identical.) The provisions of the Code provide that where, as in the instant case, two merchants enter into a contract of sale, they stand on an equal footing vis-a-vis

each other. N.Y.U.C.C. §2-104; Colo. Rev. Stat. § 4-2-104. The statute makes the signed written agreements binding according to their terms (each contains a "merger" clause) and forecloses oral proof as to terms and representations not expressed in the written agreements. N.Y. U.C.C. §§ 2-202, 2-209(2)*; Colo. Rev. Stat. §§4-2-202, 4-2-209(2). See also, Fogelson v. Rackfay Const. Co., 300 N.Y. 334, 90 N.E. 2d 881 (1950); Pimpinello v. Swift, 253 N.Y. 159, 170 N.E. 530 (1930); Caribbean Atlantic Airlines, Inc. v. Rolls-Royce Limited, 39 App.Div. 2d 673, 331 N.Y.S. 2d 921 (1st Dep't), aff'd, 31 N.Y. 2d 798, 291 N.E. 2d 582 (1972); A. Sidney Davison Coal Co. v. Weston,

* The Official Comment to Section 2-209 states: "Subsection (2) and (3) are intended to protect against false allegations of oral modifications." N.Y.U.C.C. §2-209, Official Comment n. 3.

Dodson & Co., 209 App.Div. 514, 205 N.Y.S. 49 (1st Dep't), aff'd, 240 N.Y. 705, 148 N.E. 767 (1924); Bright Radio Laboratories, Inc. v. Coastal Commercial Corp., 4 App.Div. 2d 491, 166 N.Y.S. 2d 906 (1st Dep't 1957); FMC Corp. v. Seal Tape Limited, Inc., 90 Misc. 2d 1043, 396 N.Y.S. 2d 993 (Sup. Ct. 1977).

In the instant case, the trial court, although it expressly found that the dealings between the parties were based on the written contracts of sale and the relationship of buyer and seller, and that "...these contracts which are in issue here are not contracts arising out of the role of a broker", failed to limit the proof to matters cognizable under the contract terms and under the applicable Uniform Commercial Code provisions and case law.

The statute and case law, in effect, mandated that the court instruct the jury to bring in a verdict for Bache since Commercial had admittedly repudiated the contracts. Instead, the trial judge admitted proof that, in a different and irrelevant relationship, Bache had been Commercial's broker in handling commodities futures transactions on various exchanges, that Bache promised to handle Commercial's brokerage account carefully, that Bache assured Commercial that the price of copper would rise, and that Bache's representative had stated, in a casual social discussion several months before the contracts were made, that purchase contracts could be "rolled over" by extending the date for delivery and payment.

Not only did the court admit the foregoing proof of alleged representations made months, and as much as a year, prior to the execution of the contracts, but it also instructed the jury that Bache, which was merely a seller, was in a broker's confidential relationship to Commercial and that the jury could find fraud and misrepresentation under the proof that was admitted.

The Uniform Commercial Code was enacted to bring about uniformity of treatment in agreements of sale and thereby free parties to signed written agreements from the oral claims and modifications to which desperate defaulting parties are wont to resort in an effort to escape liability. The Court of Appeals' affirmance of the trial judge's disregard of the Uniform Commercial Code

and established case law is a significant departure from state law which has had the effect of nullifying the effect and purpose of the Code.

IV

THE DECISION OF THE COURT OF APPEALS AFFIRMS A DETERMINATION SO REPLETE WITH DEPARTURES FROM ESTABLISHED PRINCIPLES AND ELEMENTARY FAIRNESS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The plaintiff herein sued to rescind fifteen written contracts that it had signed over a period of about four months for the purchase from Bache of 3,000,000 pounds of copper. After instituting a state court action which Bache removed to the federal court, plaintiff amended its complaint to assert federal securities act claims, asserting that Bache was Commercial's broker in the handling of a "discretionary" securities account and had failed in its responsibilities as broker in the handling of the account.

When the case was tried, plaintiff offered no proof whatsoever of a "discretionary account". Instead, plaintiff offered proof that, in conventional commodities futures transactions unrelated to the contracts for purchase of physical copper with which this case is concerned, Bache had been Commercial's broker. Commercial's proof was to the effect that, about a year before the contracts in issue came into existence, Bache's representative had claimed that he had special information about the metals market that would assure Commercial of profits and that he had stated to Commercial that the price of copper was bound to rise. Commercial also proffered proof that, some months before the contracts were made, Bache's representative had stated during a casual conversation at a convention, that

a purchase contract could be rolled over for later performance.

The trial court dismissed Commercial's securities claims at the end of Commercial's proof and stated that the parties' relationship was that of seller and buyer under the fifteen contracts of sale. Although this was tantamount to a determination that there was no relevant broker-client relationship between the parties, the trial court, nevertheless, let stand the testimony relating to the brokerage dealings between the parties in transactions that were different from and unrelated to the transactions represented by the fifteen contracts for the purchase of copper.

The unfairness and confusion resulting from exposing the jury to this proof was compounded by the court's charge

that Bache promised to supervise Commercial's account (there was no "account" resulting from the contracts of purchase) and that Bache was under a broker's confidential relationship with Commercial, notwithstanding the fact that the parties to the contracts of purchase were principals and "merchants" under the Uniform Commercial Code, standing on an equal footing in relation to the other. The trial court also charged the jury that one of Commercial's claims of fraud was Bache's failure to disclose that Bache was a principal, and not a broker, under the contracts in suit. Since Bache's status as a principal under the contracts is established as a matter of law by the terms and letter of the contracts, this charge further compounded the miasma of confusion that enveloped the jury.

In sum, the court permitted a simple case of an unpaid seller, under fifteen repudiated written contracts with a knowledgeable and sophisticated buyer, to be transformed into one in which the seller (actually the party offended against by the buyer's repudiation of its written obligation) was pictured as an unfaithful broker which violated its obligations to its "customer".

When the trial court decided that ". . . the particular contracts which are involved in this lawsuit are copper purchase contracts in which the plaintiff is the purchaser from the defendants, Bache, as the seller", and that: ". . . these contracts which are in issue here are not contracts arising out of the role of a broker", it should have excluded, as a matter of law, all of the proof relating

to Bache's alleged role as broker. In not doing this, and in going further to charge the jury that Bache had a confidential relationship and broker's responsibility to Commercial, the court created a state of hopeless confusion and utter unfairness to Bache which made the trial a denial of justice and due process to a degree requiring the supervisory intervention of the Supreme Court.

Because Bache, in its business dealings, occupies, at times the role of a broker in securities and commodities and at other times the role of principal in the purchase and sale of metals, the trial court and Court of Appeals should have been sensitive and alert to make certain that the jury understood that in the instant case, although Bache had been a commodities broker for Commercial at

various times, it did not occupy that role in the instant case; Bache, in these contracts was only a principal engaged in the sale of physical copper to Commercial. In these circumstances, it was patently important in order to assure Bache a fair trial, that the court insulate Bache from proof relating to irrelevant brokerage dealings with which this case was not involved. The court's failure to do this deprived Bache of a fair trial.

V

THE COURT OF APPEALS DISREGARDED THE FEDERAL POLICY IN FAVOR OF ARBITRATION. ITS FINDING OF WAIVER AND ATTEMPT TO INVITE ERROR IS NOT SUPPORTED BY THE RECORD

Bache has consistently asserted its right to arbitration. Bache demanded arbitration before this action was commenced and pleaded its right to arbitration herein as a counterclaim. It initiated proceedings to enforce arbitration in the United States District Court for the Southern District of New York, and it moved for summary judgment of arbitration in the United States District Court of Colorado and defended in the Court of Appeals the order in its favor. Only a few months before the commencement of trial it moved for arbitration before the Judge who later tried the case and

obtained the response of the District Judge, that "the question of arbitration must await the taking of evidence on the issue of the existence of investment contracts ..." (JA80).

The Court of Appeals stated that Bache's failure to bring up the matter of arbitration during the trial "... never afforded the Trial Judge the opportunity to consider whether it became at some point therein entitled to have the matter submitted to arbitration" and that this constituted a waiver. 581 F. 2d at 249. These conclusions are not warranted in light of the above-recited proceedings and the Trial Judge's awareness of the arbitration question as evidenced by his statement, at the time he dismissed the plaintiff's securities claims, that "I

know what the Court of Appeals said." (JA 604/3)

The United States Arbitration Act expresses a federal policy in favor of arbitration. Wilko v. Swan, supra, Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra. The Court of Appeals disregarded this policy and the record of Bache's efforts to obtain arbitration in its determination that the trial judge was not afforded an opportunity to make a considered ruling as to arbitration and that Bache waived arbitration.

CONCLUSION

The petition for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS DATED APRIL 26, 1973

COMMERCIAL IRON & METAL CO.,
Plaintiff-Appellee,

v.

BACHE & CO., INC., and IRVING J. LOUIS, JR., Defendants-Appellees

No. 72-1383.

United States Court of Appeals,
Tenth Circuit.

Argued and Submitted March 27, 1973.

Decided April 26, 1973.

Rehearing Denied May 22, 1973.

Before PICKETT, HILL AND BARRETT, Circuit Judges.

HILL, Circuit Judge.

Appellant Commercial Iron & Metal Co. (Commercial) brought suit in Colorado federal district court to recover money damages against or rescind its contract with the metals department of

Bache & Co., Inc. (Bache). Commercial is a limited partnership engaged in the metal and iron business in Denver, Colorado. Bache is a Wall Street corporation which, among other things, engaged in the metals business and has its principal place of business in New York City. Jurisdiction was invoked under diversity of citizenship, 28 U.S.C. §1332, and the exclusive jurisdiction of federal courts over securities violations, 15 U.S.C. §78aa. The trial court, after viewing the pleadings, affidavits and exhibits, granted Bache's motion for summary judgment on the ground that Commercial's action in federal district court was improperly brought since the parties mutually agreed in their contracts to submit disputes to arbitration.

The principal parties in this action are Morey S. Duman (Duman), the sole general partner of Commercial, and Irving J. Louis, Jr. (Louis), a first vice president of Bache and head of its metals department. During May, 1969, Louis telephoned Duman to urge him to open an account with Bache. Duman followed

this suggestion and traded in general commodities through Commercial's margin account. Duman later switched the account to one not requiring marginal deposits and traded in electrolytic copper. During the four month period from April 7 to August 7, 1970 Bache sold three million pounds of electrolytic copper to Commerical at an average price of nearly 66 cents per pound, a financial undertaking of two million dollars. Between April and the first scheduled delivery in December, 1970, copper prices plunged. As a result Commerical refused to accept delivery of the shipments. Bache thereafter liquidated the contracts at a loss of $537,175.

Commercial promptly instituted this action. Its position was that Louis on behalf of Bache induced Commercial to enter into a discretionary account with Bache in early 1970 by means of untrue and misleading representations. Commercial alleged these misrepresentations to be: (1) the price of copper was bound to rise; (2) Louis had special information and contacts which would assure Commercial a

profit; and (3) the account would be carefully managed and supervised in all respects by Louis and Bache. Commercial further alleged that while Louis was buying the electrolytic copper for Commercial he failed to disclose that: (1) from a technical standpoint it appeared likely that copper prices would fall rather than rise; (2) from a fundamental standpoint it appeared likely that copper prices would fall rather than rise; (3) Bache's sophisticated customers were generally selling rather than buying copper; and (4) Bache and Louis failed at any time up through December 14, 1971, to hedge or close out plaintiff's open position, despite the fact that primary and other copper prices had experienced the sharpest decline in years. Commercial charges that Louis' misrepresentations violate Rule 10B-5(1), (2) and/or (3)[1] and were perpetrated by use of the mails

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1. Rule 10B-5 Employment of Manipulative and Deceptive Devices.

(Footnote continued)

and interstate telephone calls. Commercial further asserts that Louis' wrongful conduct violated the fiduciary duty of a broker to his customers, and violated New York's Blue Sky Law (the Martin Act).

Appellees in their answer deny acting as broker for Commercial during the period in question. Bache contends that it sold as principal to Commercial the electrolytic copper; in support of this assertion it introduced the 15 contracts between Bache and Commercial for the copper. These contracts, all of which

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(Footnote continued)

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange,
>
> (1) to employ any device, scheme or artifice to defraud;
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, not misleading, or
>
> (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

are identical and are signed by Duman, expressly and unequivocally identify Bache as seller and Commercial as buyer. In corroboration of the charge that Commercial understood the buyer-seller relationship, a contract identical to those in dispute was introduced showing that in 1969 Commercial purchased and accepted delivery on electrolytic nickel cathodes from Bache. Other exhibits were introduced demonstrating that on previous occasions Commercial had accepted delivery on electrolytic copper. Finally appellees attached the jurisdiction of a federal district court to hear the action since all the contracts in dispute provide for arbitration of any claim or controversy arising out of or in connection with the agreement.

The trial court after reading through the pleadings, exhibits and affidavits held there was no genuine issue of material fact with respect to (a) federal jurisdiction and the arbitration clauses contained in the contracts; (b) the execution and delivery of the 15 contracts; and (c) the absence in the

transactions between the parties of discretionary authority or dealings and of the common enterprise and promotional efforts necessary to find an "investment contract." As no material issues of fact were alleged, summary judgment for appellees was accordingly granted.

Our court has been explicit in defining under what conditions summary judgment may be granted. The ultimate purpose of summary judgment is to pierce the allegations of the pleadings to show there are no genuine issues of material fact. If there is an absence of material issues then the movant is entitled to judgement as a matter of law. 6 J. Moore, Federal Practice, ¶56.02 [10], at 2043 (2d ed. 1972). Because the effect of summary judgment is a judgment in bar, however, the courts should be careful in granting such motions.

> . . . [W]hile it is the duty of the trial court to grant a motion for summary judgment in an appropriate case, the relief contemplated by Rule 56 is drastic, and should be applied with caution to the end that litigants will have

> a trial on bona fide factual disputes. Under the rule no margin exists for the disposition of factual issues, and it does not serve as a substitute for a trial of the case nor require the parties to dispose of the litigation through the use of affidavits. The pleadings are to be construed liberally in favor of the party against whom the motion is made . . . .

Machinery Center, Inc. v. Anchor National Life Insurance Co., 434 F.2d 1, 6 (10th Cir. 1970); Bushman Construction Co. v. Conner, 307 F.2d 888 (10th Cir. 1962).

The lower court, in granting summary judgment, was forced to determine whether the disputes arising out of the contracts signed by Bache and Commercial would be resolved in federal court or by arbitration as provided by the United States Arbitration Act of 1925, 9 U.S.C. §§1-14. If the contracts are no more than contracts to purchase copper at a future date, the arbitration clause found in each contract is binding on our court and precludes us from exercising jurisdiction. See Caloric Stove Corp. v. Chemical Bank &

Trust Co., 205 F.2d 492 (2d Cir. 1953). If the contracts are investment contracts, however, the judicial forum cannot be waived by the contracting parties. Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953).

Determining what constitutes an investment contract is no easy matter. As used in the Securities Act, "investment contract" is a "nebulous term, difficult of definition and even more difficult of application." Belhumeur v. Dawson, 229 F.Supp. 78, 81 (D.Mont.1964). Its purpose is "to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." SEC v. W.J. Howey Co., 328 U.S. 293, 299, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244 (1946). The Court has defined investment contract as:

> a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third

> party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

SEC v. Howey, supra at 298-299, 66 S.Ct at 1103.

Commercial takes the position that commodities transactions may be the subject matter of an investment scheme which is itself an investment contract and security. It necessarily follows that if the investment scheme constitutes an investment contract it falls within the definition of a security as provided in §3 of the Securities Exchange Act, 15 U.S.C. §78c(a)(10).[2] Commercial also

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2. The term "security" means any note, stock, treasury stock, bond debenture, certificate of interest or participation in any profit sharing agreement or in . . . any collateral-trust certificate, preorganization- certificate or subscription, transferable share, investment contract, voting trust certificate, certificate or deposit for a security, or in general, any investment commonly known as a "security". . . .

urges since the facts alleged in its complaint and Duman's affidavit establish an investment scheme by Louis, the lower court erred in granting a motion for summary judgment.

Bache contends there is no investment contract under the Howey definition because the parties entered into individual, direct transactions involving the purchase and sale of copper. It is their position that elements of general offering, common enterprise, and reliance on the efforts of a manager or promoter for the achievement of profit are lacking. Appellees therefore urge us to accept the reasoning in Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 253 F.Supp. 359 (S.D.N.Y.1966), where it was found that a sugar futures contract was not a securities contract. It was simply an agreement for the delivery of a specified quantity of a commodity at a given future time.

We do not agree with Bache's position that Commercial raised no material issues with respect to the securities laws. In Sinva the issue

was whether sugar futures contracts were securities. In our case the issue is whether the investment scheme of Louis constitutes an investment contract. If Louis' statements to Duman, as alleged in appellant's complaint, implied that all investment decisions would be made by Louis, while promising Commercial large profits, we might have a discretionary account constituting an investment contract even though the copper contracts which lay behind the arrangements are not themselves securities. See Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), cert. denied, 391 U.S. 905, 88 S.Ct. 1655, 20 L.Ed.2d 419 (1968); Berman v. Orimex Trading, Inc., 291 F. Supp. 701 (S.D.N.Y.1968); Maheu v. Reynolds & Co., 282 F.Supp. 423 (S.D.N.Y.1967).

Commercial in its complaint and Duman in his affidavit allege that Louis stated: (1) he had special information and contacts which would assure Commercial a profit and (2) that he would carefuly manage and supervise Commercial's account in all respects. As the court emphasized in Maheu v. Reynolds & Co., supra at 429:

> The line [between what is a security and what is not] is drawn . . . where neither the element of a common enterprise nor the element of reliance on the efforts of another is present.

Appellant's complaint raises an issue as to Commercial's reliance on Louis' representations which must be resolved before a court can determine the status of Bache and Louis.

[6] Appellees and the lower court relied heavily on the fact that Commercial signed contracts which identified Commercial as the buyer and Bache as the seller, thereby proving that the contracts were purchase contracts with all terms and conditions stated in the instruments. We do not place such reliance on these written "purchase contracts." Although Duman signed each contract upon receiving it from Bache's office in New York City, Louis admitted in his deposition that it was Bache's procedure to close the balancing transaction on the same day they received the order; it was not their policy to wait for a written contract

before entering into the balance of the transaction. Duman also stated that he considered the contract completed over the phone. The terms and conditions of the contract were therefore made over the telephone rather than stated in the written contract. Under these conditions it is necessary for us to look outside the written document to determine the agreement between both parties. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943); Anderson v. Francis I. duPont & Co., 291 F.Supp. 705 (D.Minn. 1968).

The lower court erred in granting appellee's motion for summary judgment at this stage of the proceeding. there are issues of material fact which cannot be determined by reading over the pleadings, affidavits and exhibits. Commercial's allegations cannot be proved unless it is given an opportunity to present evidence backing up its assertions. For the court to grant summary judgment at this stage of the proceeding effectively denies Commercial the oppor-

tunity to prove its charges of fraud. Commercial's allegations in its complaint are stringently denied by Bache and Louis. The affidavit of Duman and Louis are contradictory in material respects, and the only way to sift through these contradictory statements is by allowing Commercial to present evidence on its charges.

We must emphasize that we are in no manner implying that Commercial's agreement with Bache constituted an investment contract. At this stage of the proceedings we do not have the evidence before us to make such a determination. Our decision only states that appellant's complaint and affidavit allege issues of material fact which cannot be resolved without further proceedings.

The order granting summary judgment is set aside, and the action is remanded for further proceedings consistent with this opinion.

ORDER OF COURT OF APPEALS
DENYING REHEARING
DATED MAY 22, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

COMMERCIAL IRON & METAL CO. Plaintiff-Appellant v. BACHE & CO., INC., and IRVING J. LOUIS, JR., Defendants-Appellees	No. 72-1383

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellees in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judge Pickett, Hill and Barrett, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

s/ Howard K. Phillps,
HOWARD K. PHILLIPS,
Clerk

OPINION OF COURT OF APPEALS
DATED AUGUST 7, 1978

COMMERCIAL IRON & METAL CO.,
Plaintiff-Appellee,

v.

BACHE HALSEY STUART, INC., and
IRVING J. LOUIS, JR., Defendants-
Appellants.

No. 76-2171.

United States Court of Appeals,
Tenth Circuit.

Argued May 9, 1978.

Decided Aug. 7, 1978.

Rehearing Denied Sept. 18, 1978.

Before BARRETT and McKAY, Circuit Judges, and BRATTON, District Judge.

BRATTON, District Judge.

This is an appeal from a jury verdict in favor of plaintiff-appellee Commercial Iron & Metal Company

[hereinafter Commercial] and against the individual defendant Irving Louis, Jr. [hereinafter Louis], and the defendant Bache Halsey Stuart, Incorporated [hereinafter Bache], on its counterclaim for damages. The parties were previously before this Court upon an appeal from a summary judgment entered in favor of the defendants, and that judgment was reversed. Commercial Iron & Metal Co. v. Bache & Co., Inc. et al., 478 F.2d 39 (10th Cir. 1973). See that opinion for a full explication of the previous course of the litigation.

Appellee brought the suit for damages and to rescind contracts it had entered into with Bache for the purchase of copper metal. It predicated its claim upon violations of the federal securities laws and the securities laws of Colorado and New York, together with allegations of negligence and fraud and misrepresentation that induced it to enter into the contracts. The defendants denied the plaintiff's claims, and Bache counterclaimed for the amount lost by it upon plaintiff's repudiation of its contracts.

At the close of plaintiff's evidence at trial, defendants unsuccessfully moved for a directed verdict, but the court did dismiss plaintiff's negligence and securities claims. Only plaintiff's prayer for rescission for fraud and misrepresentation and Bache's counterclaim for damages went to the jury. Upon instructions pertaining to these claims the jury reached its verdict for plaintiff. Defendants' motions to set aside the verdict and for judgment n. o. v. were denied, and the present appeal followed.

The evidence at trial reflected that the plaintiff partnership was run by one Morey Duman [hereinafter Duman], who managed it and made all the business decisions. Duman had a commodity futures account with Merrill Lynch, Fenner and Smith and, from time to time, bought futures through one of their brokers. Plaintiff's evidence was that, in May of 1969, Duman was contacted by defendant Louis at the suggestion of a mutual acquaintance. Louis, who was in the Bache Metal Department, told Duman in a telephone call from New York that

he would like to obtain Duman's business. In a series of subsequent calls, Louis held himself out to be an expert in copper trading with international connections from which he could obtain information with respect to copper trading so that Duman would make a great deal of money by dealing with him. He assured Duman that he would carefully manage and supervise Duman's account. Duman claimed that in reliance upon these representations he was ultimately persuaded that his account at Merrill Lynch should be transferred to Bache. This was accomplished between the two companies by an "exchange for physical," a procedure involving a futures transaction in which Bache, through Louis, acted as a broker and a physical transaction in which it acted as the principal.

Duman claimed that there was no discussion between him and Louis about how the account was to be transferred and that he thought Bache was replacing Merrill Lynch only as his broker in all transactions thereafter.

Over the next few months Louis telephoned Duman frequently from New York and recommended various copper transactions, and in reliance thereon Duman ultimately became heavily involved in copper speculation, including contracts in physical copper which required no original margin deposits and no maintenance margins in the event of a market decline. At one point Duman asked Louis about the consequences of a lower price at the delivery date than that of the purchase date, and Louis told him that the delivery date could be "rolled forward" to a later month. What Louis did not tell him, Duman claimed, was that this would require payment of the difference between the original purchase price and the market price at the time of the "roll-over." At all times, Duman claimed, Louis assured him that the market was going to go up and once said that he would even reduce his commission per ton on the copper. Each telephone purchase was reflected by a confirmation, sent to and signed by Duman, which stated that Bache was the seller and appellee was

the buyer. Each such "purchase contract" also provided for arbitration.

In 1970 the price of copper dropped drastically, and Duman became concerned about the contract with a December delivery date. In mid-September, he telephoned Louis and suggested that such contract be rolled forward to a later date. It was then, Duman said, that Louis told him such a procedure would entail payment by him of the difference between the current price and the much higher original purchase price. It was during this conversation that Duman claimed to have discovered that Louis was not acting as his broker in these transactions but that in fact Bache was a principal in them.

On December 8, 1970, Duman repudiated all fifteen of the contracts involved in the present action, and Bache ultimately lost approximately one-half million dollars on them. The present action followed, with Commercial seeking damages or rescission and Bache seeking to recoup its losses.

The first contention advanced is that, upon dismissal of Commercial's state and federal securities claims, our prior opinion in the action mandated staying the trial and directing arbitration pursuant to the contract's arbitration clauses. Whatever its merit might be under other circumstances, this assertion has none here. The record reflects that Bache at no time during the entire trial raised this issue. It is not enough that it had in 1971 unsuccessfully petitioned federal courts in Colorado and the Southern District of New York for orders to compel arbitration or that it had plead the right to arbitration as an affirmative defense. Neither does its attempt to achieve arbitration some four months before trial by motion to the judge who presided at trial lend any support to its position. The plain facts are that it went to trial, and at no time during or at the conclusion of trial did it mention arbitration. It was the duty of Bache to bring the matter up, and its failure to do so can only be characterized as an attempt to invite error. In short, Bache,

by its silence throughout trial on its claim of the right to arbitration, never afforded the trial judge the opportunity to consider whether it became at some point therein entitled to have the matter submitted to arbitration. Arbitration may be waived by the conduct of the demanding party, Gutor International AG v. Raymond Packer Co., Inc., 493 F.2d 938 (1st Cir. 1974); and Bache's silence throughout trial is conduct that justifies the conclusion that it waived its right to arbitration.

Appellants next assert that it was error to accord Commercial a jury trial on what they claim was essentially an equitable claim for relief. Before trial the appellants moved for a bifurcation of the case into an equitable action and a legal action, and their motion was denied. It is conceded that Bache's counterclaim was a claim at law triable to a jury, but jury trial on the counterclaim was not demanded. Obviously, appellee could have demanded a jury trial on the counterclaim. Fed.R.Civ.P. 38(b). Commercial initially stated legal

claims and demanded damages. However, even if it were assumed that its claims were purely equitable, its claims for relief and its defense against the counterclaim were factually identical, so that bifurcation into an equitable action and a legal action would be undesirable, duplicitous and virtually impossible, and could well have deprived Commercial of its right to a full jury trial on Bache's counterclaim. See Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733,24 L.Ed.2d 729 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).

Three days before trial, Bache requested that the parties be realigned, that it be designated as plaintiff, and that it be allowed to open and close to the jury. The denial of its request is also assigned as error. The determination of the right to open and close a case rests largely in the sound discretion of the trial court, and the trial court's ruling thereon may not be

the basis of an assignment of error. Lancaster v. Collins, 115 U.S. 222, 6 S.Ct. 33, 29 L.Ed. 373 (1885); United States v. Savannah Shipyards, Inc., 139 F.2d 953 (5th Cir. 1944); see Giffin v. Ensign, 234 F.2d 307 (3rd Cir. 1956).

Numerous complaints are lodged against the instructions to the jury, beginning with the court's references to Commercial's claims that Louis solicited an "account" and said he would carefully supervise Commercial's "account," and that Bache and Louis failed to disclose that they were acting both as "brokers" or "agents" and principals. These instructions are claimed by appellants to have conveyed to the jury the erroneous impression that Bache stood in the relationship of broker to Commercial with all the different and greater responsibilities borne by a broker. The instructions properly and accurately stated Commercial's claims that material misrepresentations and omissions occurred and that plaintiff justifiably relied thereon, and the evidence at trial supports such instructions.

The claimed error in the instructions defining a confidential relationship is equally without merit. After delimiting the duty of disclosure imposed in his dealings with another upon a person in a confidential relationship to the other person, the court instructed the jury that a confidential relationship existed whenever one person, by acting or purporting to act for another, gained the trust and confidence of the other and was thereby in a position to exercise influence and dominion over the other. These instructions correctly stated the applicable law, and were not, as is here urged by Bache, tantamount to instructions that there existed a fiduciary relationship.

Next, there is the assertion that the trial court erred in refusing to apply the law of New York as called for in the contracts. The court properly instructed in accordance with Colorado law on the issue of fraud and misrepresentation. It is not necessary to discuss further appellants' objections to instructions. The instructions met the test

of sufficiency, for, taken as a whole, they adequately and sufficiently advised the jury of the parties' respective contentions and the law applicable thereto. United States v. Westbo, 516 F.2d 285 (10th Cir. 1978).

In addition to its claim of improper instructions, Bache also contends that the form of the verdict was prejudicial to it in that it set forth in exact figures the undisputed and substantial amount that would be due Bache should it prevail on its counterclaim against Commercial. Dispositive vel non of this issue is the failure of counsel to make any such objection below.

Bache claims that it was error not to grant its motion to strike Commercial's proof relating to the "roll-over" or to allow Bache to rebut it. It is sufficient to state that the court below correctly ruled that the "roll-over" was not a separate claim but was part of the evidence relating to Commercial's claim of fraud and misrepresentation, so that it did not have to be plead in the complaint and no proof that it was

absent from the complaint could be presented to the jury. The record reflects no ruling that it could not be rebutted.

Finally, appellants charge that the verdict was contrary to the evidence and that their motions for a directed verdict and judgment n. o. v. should have been granted. This argument is nothing more than an attempt to substitute their view of the evidence for what the record actually reflects. The evidence was conflicting, and the proof was not so overwhelmingly in favor of appellants as to permit a directed verdict. Kiner v. Northcutt, 424 F.2d 222 (10th Cir. 1970). It is the jury's function to judge the credibility of witnesses and weigh conflicting evidence. Loew's, Inc. v. Cinema Amusements, 210 F.2d 86 (10th Cir. 1954), cert. denied, 347 U.S. 976, 74 S.Ct. 787, 98 L.Ed. 115 (1955). There was sufficient evidence to support the verdict, and, accordingly, this Court will decline to substitute its judgment for that of the jury at the trial below.

AFFIRMED

ORDER OF COURT OF APPEALS
DENYING REHEARING
DATED SEPTEMBER 18, 1978

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges, and Honorable Howard C. Bratton, District Judge

COMMERCIAL IRON & METAL CO., Plaintiff-Appellee,	
v.	No. 76-2171
BACHE, HALSEY, STUART, INC., and IRVING J. LOUIS, JR., Defendants-Appellants.	

This matter comes on for consideration of the petition for rehearing and request for rehearing en banc filed by appellants in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Barrett and McKay and District Judge Bratton, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the request for rehearing en banc is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

FEDERAL STATUTES

UNITED STATES ARBITRATION ACT

9 U.S.C. § 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3

Stay of proceedings where issue therein referrable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of this agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such

arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall

make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATE STATUTES

NEW YORK UNIFORM COMMERCIAL CODE

§ 1-102 Purposes; Rules of Construction; Variation by Agreement

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates

words of the neuter gender may refer to any gender. L.1962, c. 553, eff. Sept. 27, 1964.

§ 2-104. Definitions. "Merchant"; "Between Merchants"; "Financing Agency"

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing Agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed

under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing Agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).

(3) "Between Merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a

contemporaneous oral agreement but may be explained or supplemented.

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

§ 2-209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section

2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required or any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

COLORADO REVISED STATUTES
UNIFORM COMMERCIAL CODE

4-1-102. Purposes - rules of construction - variation by agreement. (1) This title shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this title are:

(a) To simplify, clarify, and modernize the law governing commercial transactions;

(b) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;

(c) To make uniform the law among the various jurisdictions;

(3) The effect of provisions of this title may be varied by agreement, except as otherwise provided in this title, and except that the obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this title of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3) of this section.

(5) In this title unless the context otherwise requires:

(a) Words in the singular number include the plural, and in the plural include the singular;

(b) Words of the masculine gender include the feminine and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

4-2-104. Definitions: "merchant" - "between Merchants" - "financing agency". (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or

the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 4-2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

4-2-202. Final Written Expression - parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein, may not be contradicted by evidence of any prior agreement or of a contemporaneous oral

agreement but may be explained or supplemented.

(a) By course of dealing or usage of trade (Section 4-1-205) or by course of performance (Section 4-2-208); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

4-2-209. Modification, rescission and waiver. (1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 4-2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required or any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

RULES

Federal Rule of Civil Procedure 56

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole

case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy; and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certi-

fied copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) <u>When Affidavits are Unavailable.</u> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be

had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

DEFENDANT'S
EXHIBIT

A52

BACHE & CO.
Incorporated
Members: All Leading Exchanges - Founded 1879

36 WALL STREET, NEW YORK, N. Y. 10005 • METAL DEPARTMENT

TEL. 797-3600

COPPER
SALES CONTRACT NO. 30297

May 27, 1970

COMMERCIAL IRON & METAL CO.
1100 Umatilla Street
Denver, Colorado

Dear Sirs:

Bache & Co. Incorporated (Seller) hereby confirms the sale to you (Buyer) this day upon the following terms and conditions:

QUANTITY: (Refinery weights to govern) Three hundred (300) short tons - approximately 600,000 pound

DESCRIPTION: Electrolytic Copper - A.S.T.M. Specifications - 250/265-pound Wirebars.....

PRICE: Sixty-six cents (66¢) per pound.....

The above price applies to standard refinery shapes and is subject to usual extras for special shapes or allowance for cathodes. Standard specifications of American Society for Testing Materials to apply in adjusting any and all claims based on alleged defects. All insurance is for account of Buyer.

DELIVERY: F.O.B. Eastern U.S.A. Refinery.....

PAYMENT: Net cash against invoice.....

SHIPMENT: By rail and/or water and/or truck from smelter or refinery or ready for shipment and designated to Buyer DURING May, 1971.....

ADDITIONAL TERMS AND CONDITIONS:

1. Assent by Buyer to the terms and conditions of this contract is presumed in the absence of prompt written advice to the contrary.

2. Shipping instructions and specifications to be given by Buyer and received by Seller on or before the fifteenth day of the month immediately preceding that of shipment; if received later, or if not received, (a) shipment, or partial shipment(s), may be made at convenience of Seller; or (b) Seller may sell the quantity involved for Buyer's account; or (c) Seller may invoice the merchandise on the last day of such month as if it had been shipped on that day.

3. Payment to be made in New York Exchange. Seller may, at its option, treat as a material breach of this or any other contract between the parties and thereupon may cancel this and/or any other such contract in the event of (a) failure of Buyer to pay in full at maturity any indebtedness under this or any other contract between the parties, or (b) insolvency or bankruptcy of Buyer, including, but not limited to, proceedings under any bankruptcy act, or (c) Buyer's admitted inability to perform this or any other contract between the parties. In the event of cancellation by Seller, its damages with respect to unshipped quantities under this and/or any other contract shall be the difference between the contract price and the market price at the time of the exercise of Seller's option to cancel. Seller may, without notice to Buyer, apply in reduction of such damages any credit, deposit or other security under this or any other contract or account between Buyer and Seller.

4. Seller shall not be responsible for any delay (whether material or not) in or failure of shipment, or delivery, due to any occurrence commonly known as force majeure, including (but without limitation to) any of the following: loss or destruction of the metal, failure of transportation facilities, interruption of or delays in transportation, strikes, or controversies of any nature with employees (whether of Seller or others), interruption of or delays in transportation of materials or supplies used in the production, treatment or processing of the metals at mines or plants, breakdown of equipment at mines or plants, explosions, fires, floods, accidents to personnel or equipment, wars (domestic or foreign), riots, revolutions, rebellions, blockades, embargoes, applicable foreign or domestic governmental acts, restrictions, requisitions, regulations or orders (whether or not later proved to be invalid), failure of any of Seller's suppliers to make delivery to Seller, and any other contingencies beyond Seller's reasonable control affecting Seller's ability in the light of its outstanding contracts (and without regard to the availability of the metal in the market) to meet the requirements of this contract. In the event of any of the foregoing contingencies delivery may, at seller's option, be deferred so long as the condition prevents or delays its completion; and if seller elects to do so, seller will, within a reasonable time after termination of the contingency, ship and buyer will accept delivery in the regular course without liability for the delay.

5. All taxes, imposts and/or duties imposed and/or levied by or payable to any governmental authority under any present or future law upon this contract or upon the merchandise covered hereby or pertaining to the manufacture thereof or upon the purchase price payable hereunder shall be chargeable to and paid by Buyer, whether such taxes, imposts and/or duties shall be paid or be payable by the Seller or otherwise.

6. Any increase in freight charges effective at the time of shipment over present freight charges from point of shipment to point of actual delivery hereunder to be payable by Buyer.

7. The Buyer certifies that this merchandise is purchased for resale or as a constituent part of goods to be produced or manufactured for resale.

8. This contract shall be governed by the law of New York. No amendment or modification of this contract shall be valid or effective unless in writing signed by both parties. Any notice required to be given under the terms of this contract may be given by certified mail.

9. Any controversy or claim arising out of or in connection with the making of this agreement, its performance or breach shall be submitted to arbitration in the City of New York under the Rules of the American Arbitration Association or the Rules of Commodity Exchange, Inc., at the option of Seller. Any notice required in connection with such proceeding may be given by certified mail. Judgment upon any award rendered in such proceeding may be entered in any appropriate court having jurisdiction at the place of arbitration.

Please acknowledge your acceptance of this contract by signing the duplicate copy herewith and returning same to us.

ACCEPTED: COMMERCIAL IRON & METAL CO.

BY: [signature]

BACHE & CO. Incorporated

BY: [signature]

First Vice President

FORM 2142B-3

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